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IN THE

Supreme Court of the United States

CITY OF COLUMBUS, *et al.*,

Petitioners,

v.

OURS GARAGE AND WRECKER SERVICE, INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICUS CURIAE TOWING AND RECOVERY ASSOCIATION OF AMERICA IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Towing and Recovery Association of America ("TRAA") is the national association of motor carriers engaged in the towing and recovery of motor vehicles. TRAA is a federation of fifty state towing and recovery associations and the towing and recovery association of the District of Columbia. TRAA also represents more than 1300 motor carriers nationwide that engage in towing and recovery operations involving every type and size of motor vehicle that is operated on our Nation's highways. The proliferation of repetitive and sometimes conflicting local laws for licensing and regulating towing and recovery services imposes a tremendous burden on TRAA's members and the members of its affiliated associations, and thus this case is of particular interest to TRAA.

STATEMENT

Fifty years ago, the business of automotive towing was ancillary to a primary business such as a gas station or automotive repair garage. John Hawkins II, *The World History of the Towing & Recovery Industry* 278 (1989) ("*History of Towing*"). Tow trucks were purchased and operated by those small businesses as a means to "feed" their automotive repair shops. Then, it was not uncommon for most garages and repair facilities to own their own tow truck. There was, in the vernacular of the industry, "a tow truck on every corner."

Because so many automotive businesses owned one or two tow trucks, in those early days of towing, tow trucks did not range far from their base of operation. A tow truck was never far from the scene of an accident or breakdown.

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amicus*, its members, or its counsel, make a monetary contribution to the preparation or submission of this brief.

However, the notion that "the towing of vehicles ... is primarily a local service," *Interstate Towing Ass'n* v. *City of Cincinnati*, 6 F.3d 1154, 1163 (CA6 1993), is antiquated and no longer accurate. The past twenty years have witnessed a dramatic evolution of the towing industry from the traditional intra-city "mom and pop" small businesses, ancillary to gas stations or garages, into multi-million dollar transportation companies conducting business in many different jurisdictions. Increased costs of operating tow trucks, including equipment cost, fuel, and insurance have made it financially inefficient for an auto repair business to operate just one or two tow trucks on a part-time basis. Moreover, the emergence of self-service gas stations eliminated many small auto repair businesses along with their tow trucks.

Beginning in the early 1970s, towing increasingly became a specialty business. "Joe's Service Station and Wrecker" has given way to "Joe's 24-Hour Towing Service." A single tow truck parked in front of a local gas station, common 25 years ago, has been replaced with tow truck fleet operations, which service broad areas across multiple jurisdictions. That evolution was highlighted by the simultaneous emergence of specialty trade associations. In 1974, the first national trade organization for the towing industry, Interstate Towing Association, was formed by tow truck companies holding certificates of authority from the Interstate Commerce Commission (ICC). Hawkins, *History of Towing*, at 170. In 1979, Towing and Recovery Association of America ("TRAA"), the first national association for all towing companies, and *amicus* here, was organized. *Id.* at 169.

More recently, the towing industry has been the target of national mergers and consolidations. Within the last ten years, at least four different companies have organized nationwide networks of towing companies. *Two New Consolidators Enter the Industry*, Tow Times, Dec. 1997, at 24. Representative of that trend is United Road Services, Inc. ("URSI"), based in Albany, New York. Beginning in May

1998, URSI has acquired towing companies throughout the United States, operating them under the tradename "United Road Services." Today, the Towing Division of URSI is comprised of 22 towing firms in 16 states. Road One, Inc., another national consolidator of towing firms, operates 62 companies in 24 states.

Without "a tow truck on every corner," tow truck operations have necessarily become multi-jurisdictional, often traveling many miles through numerous jurisdictions in the course of a single tow. It is not unusual for a modern-day tow truck company to pick up vehicles in several different local jurisdictions on a daily basis. In some areas, even a tow truck company operating basically within one metropolitan area will invariably find itself doing business in a number of independent local jurisdictions. For instance, in Cook County, Illinois, there are 121 municipalities and 29 townships. U.S. Census Bureau, 1997 Census of Governments (1999). Nassau County, New York, is comprised of 66 municipalities and 3 townships. *Id.* There are 36 municipalities and 12 townships in the Cincinnati/Hamilton County metropolitan area, and 32 municipalities in the Birmingham/Jefferson County, Alabama, metropolitan area. *Id.*

One of the many examples of such multi-jurisdictional towing companies is the business run by TRAA's treasurer, Charles H. Schmidt, Jr., based in the Village of Roslyn, in the Town of North Hempstead, New York. Mr. Schmidt operates a fleet of eight tow trucks, employs four drivers, and pays license fees in thirteen different jurisdictions totaling over $4000 per year. And even though his base of operations is within ten miles of New York City, Mr. Schmidt elects not to obtain a license to pick up vehicles within the City due to the added cost and burden of New York's licensing program.

Exclusive contracts between towing firms and auto and truck dealerships, auto clubs, and dispatch services, have also served to broaden the range of operation of towing businesses. *Consolidation's Effects on Retail Towing*, Tow

Times, June 1997, at 39. Disabled vehicles, particularly heavy trucks, are regularly retrieved from distant breakdown locations and towed back to their home terminals or dealerships for repair. The towing of vehicles in interstate traffic is commonplace. Similarly, national programs such as Triple-A, OnStar, and auto manufacturer service options regularly contract with towing companies around the nation precisely to provide their customers with convenient and often pre-paid towing services wherever they may encounter problems in their travels.

Furthermore, unlike many common carriers of property (freight), towing companies regularly transport vehicles over varying and unplanned routes that are dictated by the location of the pickup and the desires of the customer. Each tow call may take the tow truck company to a different local jurisdiction to retrieve a disabled or wrecked motor vehicle. And it may likewise take the tower to any number of drop-off destinations, whether near the initial location of the vehicle or across municipal or state lines to the customer's home, place of business, or preferred garage. It is impractical, if not impossible, for a tow truck company to anticipate with any degree of certainty the location to which it will be dispatched and to which it will deliver the vehicle.

Because many local jurisdictions, like the City of Columbus, Ohio, have enacted ordinances requiring licensure *prior to* conducting towing operations within the jurisdiction, the average modern, mobile, tow truck business daily is exposed to potential licensure and regulation by dozens of localities and, on an annual basis, by perhaps hundreds of local entities. Such local regulation applies to *both* resident and non-resident towing companies that pick up within the locality.

The City of Columbus towing ordinance serves as a good example. Section 549.02 of the Ordinance provides that, other than when the vehicle being towed "has been picked up outside the City," no tow truck owner "shall permit said tow truck to be used for the purpose of towing within the City limits unless a valid tow truck owner's license obtained pursuant to this chapter has been issued and is in force for that tow truck." Pet. App. 37-A to 38-A. The tow truck *driver* also is required to obtain and hold a separate license prior to towing within the City. Under the Columbus towing ordinance, therefore, a tow truck and driver traveling from Detroit, Michigan, to within the city limits of Columbus to retrieve a disabled vehicle for a Detroit customer must obtain a tow truck permit from the City prior to retrieving that vehicle. Similar restrictions exist in hundreds of municipalities throughout the nation and are the bases of the "patchwork of local ordinances" referred to in *R. Mayer of Atlanta, Inc.* v. *City of Atlanta*, 158 F.3d 538, 546 (CA11 1998), *cert. denied*, 526 U.S. 1038 (1999).[2]

The business of automotive towing has evolved from a local activity secondary to a garage or gas station into a multi-jurisdictional transportation industry. Absent preemption of local regulation, that industry will be subject to a burdensome and varied array of local licensing requirements and regulations to the detriment of Congress' vision of a fluid national market for motor carriage services.

SUMMARY OF ARGUMENT

1. Exercising its core authority under the Commerce Clause, Congress has preempted virtually all state and local regulation related to the price, route, and service of motor carriers of property. That preemption was necessary to fulfill Congress' intent to provide a free market in the provision of such transportation services and to eliminate the vices of a multiplicity of state and local regulations. Recognizing, however, that certain motor vehicle safety regulations would also relate to price, route, or service, Congress provided a limited

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[2] Some localities go even further, and also require license for towing companies that merely drop off vehicles within the jurisdiction, regardless of the pick-up location.

exemption for such regulation by the States themselves, though not for such regulation by localities. That limited mitigation of its preemptive command again was in keeping with Congress' overall deregulatory intent, and served to channel through a limited number of decision makers any safety regulations that overlapped with the otherwise preempted field of price, route, or service. Such preemption and purposely limited authorization operate directly to free up the channels and instrumentalities of interstate commerce and to free up commercial activities that substantially affect interstate commerce. They are thus well within Congress' commerce authority and raise no significant constitutional doubts.

Having declared the field of price, route, or service of motor carriers to be of uniquely federal interest, Congress was not obliged to allow state or local regulation within that field at all. Its decision to allow some limited regulation if, and only if, generated by the States themselves, does not limit state authority, but rather gives States more authority than they otherwise had under the preemption clause. That partial allowance of authority within a federal field does not in any way raise Tenth Amendment concerns.

2. The language Congress adopted in § 14501 fully reflects its clear intent to preempt the field relating to price, route, or service of motor carriers, and its limited allowance of certain state motor vehicle safety authority that impinged upon the preempted field. Throughout the entire section the language makes a clear distinction between the States and political subdivisions of States, both in its preemptive subsections and in its subsections preserving certain authority, sometimes to States alone, and sometimes to their political subdivisions as well. Given the level of specificity in § 14501, the interpretation of the word "State" as used in the far less informative statute in *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991), simply does not apply.

3. The Sixth Circuit's correct interpretation of the safety exemption to apply only to State, and not local, regulation

does not conflict with other statutes regarding federal review of safety regulations and does not lead to any absurd results. The suggestions to the contrary are based upon unwarranted assumptions about the substantive scope of both the preemption clause and the safety exemption. While the substantive scope issues are not before the Court in this Case, and should not be resolved here, merely recognizing the parameters of the scope issues demonstrates that the alleged conflicts and absurdities are red-herrings. Because not all motor vehicle safety regulations will "relate to" a motor carrier's price, route, or service, localities will retain authority over matters such as general speed limits and traffic signage and the federal government will continue to review such non-preempted regulations regardless of local exclusion from the motor vehicle safety exemption. And as for safety regulations that *do* "relate to" price, route, or service, or regulations that do *not* involve motor vehicle safety, their preemption is perfectly reasonable and in accord with Congress' intent.

ARGUMENT

I. THIS CASE INVOLVES CORE COMMERCE CLAUSE AUTHORITY AND DOES NOT PRESENT ANY SIGNIFICANT TENTH AMENDMENT ISSUES.

Notwithstanding general considerations of comity and a reasonable caution against finding a casual or inadvertent preemption of state law, this case presents no serious doubts about Congress' constitutional authority to preempt state and local laws related to the price, route, and service of motor carriers. Indeed, petitioners do not contend otherwise. The doctrine of constitutional doubt that comes into play when Congress pushes the boundaries of its authority thus has no role whatsoever in this case.

While the doctrine of constitutional doubt "seeks in part to minimize disagreement between the branches by preserv-

ing congressional enactments that might otherwise founder on constitutional objections," the overzealous invocation of that doctrine would actually "aggravate that friction by creating (through the power of precedent) statutes foreign to those Congress intended, simply through fear of a constitutional difficulty that, upon analysis, will evaporate." *Almendarez-Torres* v. *United States*, 523 U.S. 224, 238 (1998). As this Court has recognized, the "'constitutional doubts' argument has been the last refuge of many an interpretive lost cause. Statutes should be interpreted to avoid *serious* constitutional doubts, * * * not to eliminate all possible contentions that the statute *might* be unconstitutional." *Reno* v. *Flores*, 507 U.S. 292, 314 n. 9 (1993) (emphasis in original; citation omitted); *see also Almendarez-Torres*, 523 U.S. at 238 (doctrine requires "a serious likelihood that the statute will be held unconstitutional. Only then will the doctrine serve its basic democratic function of maintaining a set of statutes that reflect, rather than distort, the policy choices that elected representatives have made").[3]

Given the absence of any serious constitutional issue in this case, therefore, the question for this Court is wholly one of ordinary statutory construction without resort to the doctrine of constitutional doubt.

A. Regulation of Transportation Services Lies at the Heart of Congress' Commerce Clause Authority.

The statutory provision underlying this case is 49 U.S.C. § 14501(c)(1), which expressly preempts state and local regulation related to price, route, or service of any motor carrier

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[3] And even colorable constitutional claims do not require application of the doctrine of constitutional doubt . The "doctrine does not apply mechanically whenever there arises a significant constitutional question the answer to which is not obvious." *Almendarez-Torres*, 523 U.S. at 239. "[W]here a constitutional question, while lacking an obvious answer, does not lead a majority gravely to doubt" a statute's constitutionality, "precedent makes clear that the Court need not apply" the doctrine *Id.*

with respect to the transportation of property. That statute falls squarely within Congress' well-established Commerce Clause authority. While various *amici* breathlessly decry perceived Commerce Clause and Tenth Amendment violations from such preemption, the parties themselves make no such claims, and the United States – by asserting that even broader preemptive authority lies with the Secretary of Transportation – plainly rejects such contentions. *See* U.S. Br. at 16 n. 2 ("Congress possesses *power* to preempt municipal regulation without preempting state-level regulation") (emphasis in original). And as to the specific issue in this case – whether Congress' exemption for state motor vehicle safety regulatory authority that would otherwise relate to price, route, or service necessarily exempts restrictions imposed by political subdivisions – the parties likewise make no suggestion that a local exemption is in any way *required* by the Commerce Clause.

That motor carriers of property, as a class, are regularly engaged in interstate commerce is beyond dispute. Towing services as part of that class are just as clearly involved in interstate commerce on a regular and increasing basis. This stems not only from interstate tows themselves, but also from the fact that vehicles being towed may have crossed state lines, that the contracts entered into for towing services are frequently interstate in nature, that interstate ownership of towing services is on the rise, and that national programs such as Triple-A, OnStar, and automaker service packages that include towing are themselves elements of interstate commerce.

Furthermore, the inherently commercial and mobile nature of motor carriage services, and Congress' desire to facilitate a free and unburdened national market in such services, easily involves a substantial effect on interstate commerce even where particular instances of motor carriage occur within a single State. This Court has recognized that the scope of the commerce power was influenced by "great changes that had occurred in the way business was carried on

in this country." *United States* v. *Lopez*, 514 U.S. 549, 556 (1995). Just as in so many areas of the economy where "enterprises that had once been local or at most regional in nature had become national in scope," *id.*, so too has motor carriage in general, and towing in particular, transformed from a local to a regional and increasingly national industry. While this Court has questioned some of Congress' more ambitious efforts to regulate noncommercial local activity, it has squarely confirmed Congress' authority over intrastate commercial matters that affect an integrated national economy. *See id.* at 558 ("Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"); *id.* at 560 ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."); *id.* at 561 (distinguishing criminal statute that "has nothing to do with 'commerce' or any sort of economic enterprise" from "cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce").[4]

The preemption authority exercised by Congress in § 14501(c) over matters relating to price, route, or service of motor carriers of property does not even approach the outer boundaries of Congress' well-settled and recently confirmed Commerce Clause power. As Justice Kennedy has explained:

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[4] That in any specific instance a particular tow may itself be intrastate, or that towing in general may involve a significant percentage of intrastate activity, does not change matters at all. Congress is entitled to legislate categorically and need not create exceptions to its general rules on commerce solely for the particular instances that do not perfectly align with the general purpose or authority. *See Maryland* v. *Wirtz*, 392 U.S. 183, 197 n. 27 (1968) ("where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence").

> Stare decisis operates with great force in counseling us not to call in question the essential principles now in place respecting the congressional power to regulate transactions of a commercial nature. That fundamental restraint on our power * * * mandates against returning to the time when congressional authority to regulate undoubted commercial activities was limited by a judicial determination that those matters had an insufficient connection to an interstate system. Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy.

Lopez, 514 U.S. at 574 (Kennedy, J., concurring). There is thus no credible, let alone serious, constitutional doubt that would justify applying of a cannon of avoidance when interpreting § 14501.

B. Tenth Amendment Concerns Are Minimal.

While petitioners' *amici* complain of perceived Tenth Amendment violations, Congress is exercising preemptive authority comfortably within its commerce power, which strongly tends to negate any Tenth Amendment concerns absent some truly exceptional attempt to commandeer state officers to carry out a federal program against their will. In *Printz* v. *United States*, 521 U.S. 898, 905 (1997), for example, this Court rejected an attempt at "compelled enlistment of state executive officers" that sought to force them to act as agents of the national government by "press[ing] them into federal service" to "execute federal laws." But this Court distinguished the situation where a statute "did *not* commandeer state government, but merely imposed preconditions to continued state regulation of an otherwise pre-empted field." 521 U.S. at 929 (citations omitted).

In *New York v. United States*, 505 U.S. 144 (1992), this Court similarly rejected an effort to commandeer state legislatures by compelling them to adopt a federal program. This

Court again noted that "where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation." *Id.* at 167. The statute in *New York*, however, went further and directly compelled state legislative acts. *Id.* at 175-76. Such compulsion, this Court had observed, differs from preemption in that it shifts accountability by leaving state officials no choice but to regulate according to federal commands and "bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *Id.* at 169.

This brief review of *Printz* and *New York* demonstrates that there is no Tenth Amendment violation lurking in this case. A valid prohibitory statute serving to free up the channels and instrumentalities of commerce, and to facilitate a competitive national market in motor carriage services, is a far cry from the exceptional commandeering of state personnel or legislatures. It merely tells States and localities what they may not do, not what they *must* do, and forbids the adoption of fragmented local "safety" regimes that also relate to price, route, or service. Other local safety regulation unrelated to the area of federal interest are left intact, as is the States' authority to adopt, or not adopt, still further safety measures that might otherwise fall within the federal field. Separate state and federal accountability thus is preserved by the option for the States not to regulate at all within the preempted field, and leave the "electoral ramifications" of such preemption to rest at the national government's door.

This Court recognized the validity of just such a regime in *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, observing that the conditional exception to federal preemption in that case "establishes a program of cooperative federalism that allows the States, *within limits established by federal minimum standards*, to enact and administer their own regula-

tory programs." 452 U.S. 264, 289 (1981) (emphasis added). And this Court rejected the claim that the conditions placed on state conduct within the preempted field improperly restricted the "States' freedom to make decisions in areas of 'integral governmental functions,'" finding that such claim was based on the "incorrect" assumption that "the Tenth Amendment limits congressional power to pre-empt or displace state regulation of private activities affecting interstate commerce." *Id.* at 289-90. The precise same analysis applies in this case.

In setting out the basic scope of preemption, Congress was well within its authority to forbid the States and their political subdivisions from regulating in relation to the price, route, or service of motor carriers of property. Congress then chose, but surely was not compelled, to allow the States alone to trench upon this area of exclusive federal authority, but only to the extent that such regulations *also* related to the safety of motor vehicles.

Given the initial starting point of lawful and undisputed federal preemption, and the unrequired softening of some of the effect of federal supremacy, it can hardly be said that Congress has violated state rights because it did not give them yet more leeway. Congress need not have given them any leeway at all. The parties never argue otherwise. If Congress can eliminate state authority in a particular area of federal interest, then surely it can condition limited exercise of such state authority on the State itself making the decisions rather than merely abdicating such authority to lesser entities. *See Mortier*, 501 U.S. at 616 (noting that Congress is free to enact legislation to prevent local regulation from burdening commerce, but simply had not done so in FIFRA)

The notion that the State is free to set up political subdivisions and other instrumentalities to act in areas the State itself chooses to avoid is no different than other "integral government functions" that may be conditionally preempted, *Hodel*, 452 U.S. at 289, and is hardly a sufficient basis for creating

an overbearing presumption in favor of such authority where the statutory language is to the contrary. The State also has generally unimpeded authority to establish private corporations or to cede its authority to private citizens in general, but surely is not assumed to have authority to let all those below it likewise act in derogation of otherwise applicable federal law that contains a limited exemption for the State itself.

Cases discussing a State's authority relative to its political subdivisions generally arise in very different contexts than the situation on this case. Some involved constitutional challenges by citizens to the composition, governance, or functions of political subdivisions. *See, e.g., Sailors* v. *Board of Ed. of Kent Cty.*, 387 U.S. 105, 108 (1967) (due process and equal protection challenge to appointment of local officers); *Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907) (constitutional challenge to State's decision to consolidate two political subdivisions into one). Others involved the relationship between States and subdivisions in connection with the States' own means of governance at the state level. In *Reynolds* v. *Sims*, 377 U.S. 533, 575-76 (1964), for example, this Court was discussing the subordinate nature of municipalities to distinguish them from sovereign States, to reject an analogy between the Federal-State relationship and the State-Locality relationship, and thereby to *strike down*, on equal protection grounds, the State's attempt to apportion votes in its legislature to its localities according to the federal model of representation. What these cases have in common is that they discuss the State's authority over it's political subdivisions vis-à-vis *its own citizens* not in the context of federal statutes that treated localities differently from States in order to accomplish some federal purpose. But while States may indeed have a relatively free hand in composing their subordinate creatures, nothing in those cases suggests a federal obligation to accord such subordinates equal consideration to the States themselves when deciding what sorts and sources of regulation will be allowed within a field of federal interest.

Viewed in proper perspective, therefore, there are few legitimate Tenth Amendment concerns in this case, and certainly none that even approaches a substantial constitutional question that need be "avoided" through a strained construction of the language of § 14501.

While general considerations of comity are certainly valid even within the plain scope of congressional power, Federal/State comity is a two-way street and is equally owed to Congress when it has exercised its constitutional powers. Where the baseline, as in this case, is the express and unequivocal preemption of both State and local regulation, presumptions against preemption should carry considerably less weight. Imposing a series of additional judicial hurdles for each exercise or adjustment of power within a field of express federal preemption denigrates the supremacy of federal legislation and swings the pendulum of comity out of balance just as much as does the allowance of casual and unintended preemption of state authority where Congress has *not* preempted a particular field. Because this case involves a limited exception to the express preemption of a field of federal interests, the Court should place primary emphasis on the language Congress selected, the context in which it arises, and the interrelation of closely related provisions.

II. THE PLAIN LANGUAGE OF SECTION 14501 EXPRESSLY DISTINGUISHES BETWEEN STATE AND LOCAL REGULATORY AUTHORITY.

"The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997). In this case it is the specific context of § 14501 that unambiguously establishes distinct and exclusive meanings for "State" and "political subdivision" and excludes the latter from the safety exemption of § 14501(c)(2).

Language throughout § 14501 confirms that when Congress intended to preserve the otherwise preempted authority of political subdivisions, it did so in a far more direct fashion. Section 14501(a)(1), for example, preempts, *inter alia*, any "State or political subdivision" from enacting certain rules relating to motor carriers of passengers, rather than property. But it expressly states that such preemption "shall not apply to intrastate commuter bus transportation." By exempting the entire subfield of intrastate commuter buses, in contrast to § 14501(c)(2)(A)'s specific limitation of the conduct of a particular government actor within a subfield, the exception plainly covers conduct by *any* of the actors listed in the preemption provision. Section 14501(c)(2)(B) likewise contains a similarly actor-neutral field exemption for the "transportation of household goods," and § 14501(c)(2)(C) contains an express exemption for political subdivisions, restoring the otherwise plainly preempted "authority of a State or political subdivision of a State" to regulate the price of non-consensual tows. Section 14501(c)(3) is similarly direct in providing that the general preemption clause "shall not affect any authority of a State, political subdivision of a State, or political authority of two or more States" to act with respect to intrastate transportation of property in providing certain voluntary uniform rules and antitrust immunity. Such evidence of usage from within the same statutory section provides the most compelling evidence of the meaning of the word "State" in the safety exemption. *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 502 (1998) ("similar language within the same statutory section must be accorded a consistent meaning")

Numerous other statutes demonstrate that when Congress intends to preserve the authority of both the States and their political subdivisions, it does so quite clearly, thus supporting the Sixth Circuit's conclusion that the exclusion of political subdivisions from the safety exemption was meaningful. For example, under the Plant Protection Act, Congress has pro-

vided that "no State or political subdivision of a State may regulate the movement in interstate commerce" of certain plants, 7 U.S.C. § 7756(b)(1), but then allowed a "State or a political subdivision of a State [to] impose prohibitions or restrictions * * * that are consistent with and do not exceed the regulations or orders issued by the Secretary" and allowed a "State or political subdivision of a State [to] impose prohibitions or restrictions * * * that are in addition to the prohibitions or restrictions imposed by the Secretary under certain conditions, 7 U.S.C. § 7756(b)(2).[5]

While the narrow use of the word State in other statutes does not determine its meaning in § 14501, it does demonstrate that the word's correct meaning is context dependent and that petitioners' suggestion of a "tradition of meaning" that inherently includes the right to delegate to political subdivisions is pure fiction. Rather, while statutory references to

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[5] *See also* 12 U.S.C. § 4122(b) ("This section shall not prevent the establishment, continuing in effect, or enforcement of any law or regulation of any State or political subdivision of a State not inconsistent with the provisions of this subchapter"); 15 U.S.C. § 1203 ("no State or political subdivision of a State may establish or continue in effect a flammability standard" for certain fabrics, but allowing "the government of any State or political subdivision of a State [to] establish and continue in effect a flammability standard or other regulation applicable to a fabric, related material, or product for its own use" and allowing "application of a State or political subdivision of a State" for further exemptions); 25 U.S.C. § 2806 ("the provisions of this chapter alter neither * * * the law enforcement, investigative, or judicial authority of any * * * State, or political subdivision or agency thereof") ; 29 U.S.C. § 1144(c)(2) (ERISA preemption provision defining the term "State" to include "a State, any political subdivisions thereof, or any agency or instrumentality of either"); 42 U.S.C. § 2000e-7. (Title VII savings clause providing that "Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State," with some exceptions); 47 U.S.C. § 224 (preserving certain State regulatory authority over pole attachments for cable and telecommunications services, defining "State" to mean "any State, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof").

a "State's" authority may sometimes include the authority to delegate to political subdivisions, they just as frequently exclude such delegation and refer only to the State's authority to act itself, rather than through proxies. With specific context being the determining factor, there is simply no doubt that the exemptions for State motor vehicle safety regulatory authority in § 14501 is in contradistinction to the numerous specific references to political subdivisions in that same section.

Petitioners' reliance on *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991), illustrates not any inherently broad meaning to the "State" authority, but rather the context-dependent interpretation of any references to such authority. Indeed, the material differences between *Mortier* and this case are numerous and dispositive.

First, as this Court recognized in *Mortier*, FIFRA "nowhere expressly supersed[ed] local regulation of pesticide use." 501 U.S. at 606; *see id.* at 607 ("the statutory language * * * is wholly inadequate to convey an express preemptive intent on its own"); *id.* at 610 n. 14 (it is "clear that the provision is written exclusively in terms of a grant," not a prohibition). The preemption clause in § 14501(c), by contrast, *expressly* supersedes the authority of "political subdivision[s]," and nowhere expressly *redeems* local authority from Congress' unambiguous preemption of the field. While the question in *Mortier* was thus whether to infer *preemption* of local authority – an inference not lightly drawn – the question in this case is whether to infer an *exception* to the express preemption of local authority – an inference that likewise should not be lightly drawn.

Similarly, unlike in *Mortier* where preemption was claimed from "mere silence," and thus would have relied on the disfavored "negative pregnant" described by petitioners, Pet. Br. 22, in this case the negative that arises from the failure to save local authority is not pregnant at all, but is fully born in § 14501(c)'s express negation of local authority.

The point is illustrated by examining the result if there were no *savings* clause in either *Mortier* or this case. In *Mortier* there would be no field preemption of either state or local authority, as this Court recognized. *See* 501 U.S. at 607 (noting that there was "no suggestion that FIFRA was a sufficiently comprehensive statute to justify an inference that Congress had occupied the field to the exclusion of the States"). Absent the savings clause, therefore, any preemption would have been determined on a case-by-case conflict analysis. *Id.* ("Even if FIFRA's express grant of regulatory authority to the States could not be read as applying to municipalities," it would only mean "that localities could not claim the regulatory authority explicitly conferred upon the States that might otherwise have been pre-empted through actual conflicts with federal law."); *id.* at 614 ("The specific grant of authority in § 136v(a) * * * acts to ensure that the States could continue to regulate use and sales even where, such as with regard to the banning of mislabeled products, a narrow pre-emptive overlap might occur.").

The claim in *Mortier* that local authority was preempted from the entire field, therefore, was exclusively derived from a negative implication from the savings clause itself, which allegedly generated field preemption where none would otherwise exist. But such an inference of field preemption in general would have rendered other more specific preemptive provisions in FIFRA "pure surplusage." *Id.* at 613. This Court went on to hold that regardless whether the grant of authority to the States included localities, "the type of local regulation at issue here would not fall within any impliedly pre-empted field." *Id.* at 614.

In the current case, by contrast, there is no question that absent the savings clause local authority – including local motor vehicle safety authority – would be fully and expressly preempted insofar as it related to price, route, or service of motor carriers of persons or property. The "negative" of preemption does not rely on any inference from the savings

clause. Rather, it exists independently. Unlike in *Mortier*, where there was "no actual conflict either between FIFRA and the ordinance before us or between FIFRA and local regulation generally," *id.*, here there is plainly a conflict between the Columbus Ordinance and the general preemption clause. And in contrast to *Mortier*, it is only the broader reading of "State" to encompass "political subdivision" that would render language in the same statute "surplusage."

Second, the statutory language construed in *Mortier* was not, contrary to petitioners' suggestion, Pet. Br. 18, the phrase "regulatory authority of a State." Rather, the statutory language there read, in relevant part, that a "*State may regulate* the sale and use of any federally regulated pesticide or device in the State." 7 U.S.C. § 136v(a). That language, however, does not mirror the language of the savings clause at issue in this case, but instead tracks more closely to the phrase in the *preemption* clause of § 14501(c)(1), which reads that a "*State* [or] political subdivision * * * *may not enact or enforce a* law, *regulation*, or other provision" related to price, route or service. The phrase "regulatory authority" that petitioners so heavily rely on comes not from the statute in *Mortier*, but rather from the Court's own abbreviated summary of the import of the statute. Insofar as Congress would look to *Mortier* as a signal for future statutory phraseology, it would most reasonably look to the actual statutory language – "A State may regulate" – that was interpreted in that case, not to this Court's varying paraphrases of that language. *See* 501 U.S. at 602, 607 ("States may regulate"; "state regulation"; "authorizes 'States' to regulate"; "grant of regulatory authority to the States"; "regulatory authority explicitly conferred upon the States").

Focusing on the actual language of the statute in *Mortier* not only deflates petitioners' claims of a fixed Congressional understanding of the different phrase "regulatory authority," it also points up the inconsistency in petitioners' attempts to draw a distinction based on sentence structures within

§ 14501(c). *See* Pet. Br. at 23. Given that the FIFRA language addressed in *Mortier* tracks more closely to the preemption clause here, any supposed pattern followed by Congress would more reasonably have been found there rather than in the safety exemption. But Congress, if it had the FIFRA language in mind at all, indisputably departed from that model by expressly referencing political subdivisions when *Mortier* would supposedly have indicated that such reference was unnecessary. The obvious explanation for such a departure is that Congress had a particular need in § 14501 to provide separate reference to States and political subdivisions in the more analogously structured sentence because it intended to treat them separately and differently, rather than as a unity, for purposes of preemption. And § 14501(c)(2) immediately bears out that intent by reinstating certain powers of the States alone but leaving political subdivisions uninsulated from the primary preemption clause.

Third, in FIFRA itself there was conflicting language that squarely authorized conduct by local authorities, and which would have been rendered nonsensical by a narrow construction of "State" authority in that case. As this Court recognized, if "the use of 'State' in FIFRA impliedly excludes subdivisions, it is unclear why the one provision would allow the designation of local officials for enforcement purposes while the other would prohibit local enforcement authority altogether. *Mortier*, 501 U.S. at 608-09; *see also*, *id.* at 616 (Scalia, J., concurring in the judgment) (language of subsection suggests a preemptive interpretation "were it not for the inconsistent usage pointed to in Part I of the Court's opinion"). In this case, by contrast, there is no inconsistent usage within the same statute.[6]

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[6] This Court in *Mortier* also noted that the "scattered mention of political subdivisions elsewhere in FIFRA does not require their exclusion here." 501 U.S. at 612. In this case, by contrast, the numerous references to political subdivisions are not "scattered" at all, but occur repeatedly in the very same section, in subsections that expressly preserve certain authority

Petitioners also suggest that the inclusion of political subdivisions in the preemption clause was merely belt-and-suspenders redundancy, and that the exclusion of the term from the motor vehicle safety exemption was in deference to the States regarding the choice of further delegation to their subdivisions. Pet. Br. 24. Both suggestions are fanciful.

Petitioners' belt-and-suspenders theory of construction seeks to impute a meaningless redundancy to Congress despite this Court's long-held rejection of such constructions. *See Mortier*, 501 U.S. at 613 (rejecting construction that would render "pure surplusage" and ""doubly superfluous" the language in the immediately following subsection). Furthermore, if redundant certainty were Congress' goal, surely it would have utilized the same device in the exemption clause as well – just to make sure no court would draw the natural, obvious, and more limited conclusion that the difference in statutory language actually had substantive meaning. The notion that it only listed the States in deference to their discretion to delegate authority further is not even remotely credible. Congress *did* list both levels of government as eligible for an exemption when that was its intent. 49 U.S.C. §§ 14501(c)(2)(C) & (c)(3). And listing both States and localities as merely being *exempt* from preemption would not imply any lack of deference to State authority over political subdivisions and surely could not be read as *conferring* independent local power as against the States.

Ultimately, against the background of express field preemption here, the plain usage is be precisely the opposite of that suggested by petitioners and carries the meaning ascribed by the Sixth Circuit. Indeed, Justice Scalia recognized just such a point in *Mortier*, noting that while FIFRA itself did not preempt the field at issue, "[i]f there *were* field preemption, 7 U.S.C. § 136v would be understood not as restricting certain

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for political subdivisions, and in the primary preemption clause itself, which preempts certain laws by political subdivisions.

types of state regulation (for which purpose it makes little sense to restrict States but not their subdivisions) but as *authorizing* certain types of state regulation (for which purpose it makes eminent sense to authorize States but not their subdivisions)." *Mortier*, 501 U.S. at 616 (Scalia, J., concurring in the judgment). In this case, of course, there *is* express field preemption that specifically applies to both States and political subdivisions, and the language of § 14501(c)(2) is plainly understood as authorizing certain State regulation "for which purposes it makes eminent sense to authorize States but not their subdivisions."

III. THE SUPPOSED CONFLICTS GENERATED BY THE SIXTH CIRCUIT'S INTERPRETATION OF SECTION 14501 STEM FROM UNWARRANTED ASSUMPTIONS ABOUT THE SCOPE OF PREEMPTION.

The various peculiar consequences claimed by the parties and their *amici* to arise from the Sixth Circuit's reading of § 14501 will not come to pass because they are based on erroneous assumptions regarding the scope of the preemption clause and the safety exemption. While scope issues are not before the Court in this case, merely recognizing that preemption operates only on that subset of safety regulations also relating to price, route, or service, and that the safety exemption applies only to motor vehicle safety, is sufficient to eliminate any conflicts or absurdities without reaching the precise substantive scope of the relevant clauses.

A. The Sixth Circuit's Preemption Analysis Does Not Conflict with Federal Review Authority Over State and Local Safety Regulations in General.

Petitioners and the United States as *amicus* argue that the Secretary of Transportation's authority to review local safety regulations demonstrates that such regulations that also relate to price, route, or service are not preempted lest the Secre-

tary's authority lack a meaningful predicate. Pet. Br. 29; U.S. Br. at 18-20. That argument is incorrect.

First, the Secretary's review authority, enacted long before the statute in this case, and thus prior to express preemption, has little bearing on interpreting the later-enacted preemption provisions of § 14501. There is no indication that Congress intended to preserve the prior regulatory regime and, indeed, its intent was the precise opposite. As this Court recognized in *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992), even an express "general 'remedies' savings clause cannot be allowed to supersede the specific substantive preemption provision," especially where "the 'savings' clause is a relic of the pre-ADA/no preemption regime." What was true in *Morales* carries even greater force here because the Secretary's review authority does not even purport to "save" or "authorize" local regulation that would be preempted by other statutes. It merely allows the Secretary to impose even *further* preemption as against local regulation that might otherwise exist. Because § 14501(c)(1) is substantively indistinguishable from the ADA provision in *Morales*, and the Secretary's review authority is equally a "relic" of the previous "no preemption regime," this Court should reach the same result here as it did in *Morales*. Indeed, given petitioners' heavy reliance on the proposition that Congress legislates against the background of judicial construction, Congress' decision to model the FAAA Act on the ADA shortly after the *Morales* decision indicates an expectation that this Court would discount inconsistencies with relics of the no preemption regime and fully intended that any vestigial regulatory references be superseded by the new preemption provision.[7]

[7] Such an assumption of direct incorporation of virtually on-point precedent is far more reasonable than assuming that Congress chose the language of the safety exemption by reference to this Court's *paraphrase* of different statutory language in an entirely different field that is the responsibility of entirely different congressional subcommittees.

Second, the claim that preemption of some local motor vehicle safety regulation would vitiate the Secretary's review authority incorrectly assumes that *all* local safety regulation would be preempted by § 14501(c)(1) absent a local exemption under § 14501(c)(2). But the preemption clause itself plainly leaves room for local safety regulation that is *unrelated* to price, route, or service, wholly apart from the applicability of the safety exemption. The proper reconciliation of § 14501 and the federal review authority is that localities may not impose any safety regulations that *also* relate to price, route, or service, but may impose unrelated safety regulations that act as the predicate for the Secretary's review.

General speed limits illustrate the point, as it seems beyond reasonable dispute that speed limits applicable to all vehicles rather than just motor carriers – like restrictions against driving down the sidewalk or running red lights – do not "relate to" the price, route, or service of a motor carrier and thus would not be preempted by § 14501(c)(1). *Cf. American Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 227-33 & n. 7 (1995) (discussing scope and limits of preemption under ADA); *id.* at 242 (O'Connor, J., concurring in part and dissenting in part) (same). One could imagine, however, a locality setting an unusually low speed limit on a particular through road as a trap for the unwary and a device for generating local revenue through speeding tickets.[8]

A similar reconciliation applies to the Secretary's review authority over State and local weight, width, and hazardous materials restrictions. For example, a sign declaring the weight capacity of a small local bridge, and forbidding any

[8] As anyone who has driven to vacation spots with high tourist traffic has likely experienced, some localities en route will suddenly and inexplicably lower their speed limit to the level of a crawl on an otherwise unexceptional road, and then conveniently post a squad car to hand out tickets with alacrity. Such a local "safety" regulation would not be expressly preempted by § 14501(c), but might be found an unnecessary burden were the Secretary asked to consider the matter.

overweight vehicles – commercial or otherwise – from driving on the bridge likely would not have a sufficient "connection" to be preempted. But the Secretary would retain review authority in case a locality understated the weight capacity as a subterfuge for controlling the routes of motor carriers.

By recognizing that there are some limits to the preemption clause even apart from the safety exemption, this Court can find ample retained meaning for the Secretary's review authority while at the same time applying the plain meaning of § 14501(c)(2) to exclude political subdivisions.

B. Preemption of Local Authority to Enact or Enforce Their Own Laws Does Not Preclude Them from Assisting in the Enforcement of Valid Laws Established at a Higher Level of Government.

Petitioners suggest that excluding political subdivisions from the motor vehicle safety exemption would not only bar them from enacting or enforcing their own preempted regulations, but would also absurdly preclude them from enforcing valid state laws allowed by the safety exemption. Pet. Br. at 26. That reading, however, is incorrect in that it abstracts the word "enforce" from its overall context within the preemption clause. A proper contextual reading of the preemption clause, however, is that neither the States nor political subdivision may enact *new* laws or enforce *existing* laws that are invalid under the preemption clause. That reading of the preemption clause recognizes that the function of the word "enforce" is not to impose a limit on the implementation of otherwise valid laws, but rather to close the temporal gap that would exist by use of the word "enact" alone. If the statute merely precluded "enactment" of laws within the scope of the preemption analysis, it would leave open the question of whether *existing* laws that would be preempted if newly enacted were nonetheless grandfathered. By adding the word "enforce," the preemption clause makes clear that no such grandfathering was intended and that a law within the scope of the clause is preempted regardless of when it was adopted.

But where a particular law *is* valid as being outside the preemption clause or exempted therefrom, such laws may be enforced by whatever level of government is authorized to do so. Such ministerial enforcement of otherwise valid laws was simply not meant to be preempted, thus avoiding the absurdity suggested by petitioners' reading while preserving the plain distinction in the scope of state and local authority.

That common-sense reading of the "enforce" language to refer to existing laws that would be preempted if adopted anew finds support in both the Department of Transportation's own memoranda and in this Court's cases. For example, in a memorandum cited by the United States, the Department of Transportation opined that the FAAA Act "'specifically reserves the States' (and local governments[']) to the extent that they derive power from the States) authority to regulate with respect to safety * * *.'" U.S. Br. at 25 (quoting *Memorandum re: Federal Aviation Administration Authorization Act of 1994* at 2 (Jan. 1995)) (emphasis omitted). What is significant about this passage is not merely the mention of localities, as the United States would have it, but the qualification that the Department interprets the Act to allow localities to act *only* "to the extent that they derive power from the States." Under the current litigating positions of the petitioners and the United States, however, that qualification would be utterly meaningless: *All* local power derives from the States and there is simply no "extent" otherwise. Assuming the Department of Transportation was not intending to include nonsensical commentary in its memorandum, it must have believed that there is some local authority that would *not* "derive" from the States and that would therefore be preempted.[9] The sensible answer is that the Department at the

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[9] Of course it might well be that the Department's analysis of the FAAA Act was simply cursory and poorly thought out, leading to what now

time understood such derivative power to be that of *enforcing* otherwise valid state laws and regulations, but did not reach "to the extent" of allowing localities to enact or enforce their own substantive requirements under more general discretionary authority merely abdicated to them by the State.

Similar support for the notion that local enforcement of valid state substantive law should be treated differently from local enactment and enforcement of its own preempted requirements can be found in *Mortier*. There this Court recognized a distinct category of local ordinances "enacted independently of specific state or federal oversight." 501 U.S. at 615. And while this Court in *Mortier* found that such independent local conduct was not preempted by FIFRA, what is significant for current purposes is the implicit recognition that independent local conduct might ultimately pose a different question than mere enforcement authority specifically tied to a state program. Given that § 14501(c)(1) in this case *does* specifically preempt local laws and regulations relating to price, route, or service, the most sensible construction of the "enact or enforce" language would focus on the temporal function of the word "enforce" while recognizing that preemption did not apply to local enforcement of specific state laws validly enacted by the State itself. In such situations, localities would indeed be acting as ministerial agents of the State rather than in their own discretionary capacity.

Finally, if petitioners' reading of the word "enforce" in isolation were correct, it would lead to its own absurd results under petitioners' preferred interpretation of the remainder of the statute. If the authority to enforce were preempted independently of the substantive validity of the law or regulation

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seems nonsensical in light of the United States' litigating posture. But if that is so, the memorandum is entitled to no deference whatsoever. And the United States' current attempt to recharacterize that memorandum to mean something other than what it says is likewise entitled to no deference, being no more than a convenient litigating position.

being enforced, that would preclude both state and local governments from assisting in the enforcement of *federal* regulations relating to price, route, or service that could not be *enacted* by the States or their subdivisions alone. Given the express contemplation of such cooperative enforcement of federal regulations, such a result would be absurd, and suggests a misreading of the scope of preemption in the first place.

Overall, a proper construction of the word "enforce" would be tied to the validity of the underlying law or regulation being enforced. Municipalities would thus be able to enforce valid state motor vehicle safety laws and regulations, but could not enact or enforce their own such laws insofar as they also related to price, route, or service. That reading is fully compatible with the Sixth Circuit's decision and avoids any absurdities regarding enforcement of state law.

C. The Remaining Scope of State and Local Preemption Accords with Common Sense in Light of Congress' Free-Market Goals.

Petitioners and their *amici* make much of the supposedly absurd consequences of preempting local motor vehicle safety authority related to price, route, or service. Those claims, however, are based on various erroneous assumptions concerning the substantive scope of both the preemption clause and the savings clause. While issues of scope are not before this Court, it is nonetheless important to recognize that the parade of horribles claimed to ensue from local preemption simply disappear with the recognition of some general limits on the scope of "relate to" preemption.

For example, the fear that speed limits and basic generally applicable traffic laws will be preempted disappears with the recognition that such laws lack the requisite "connection" with motor carrier price, route, or service. As this Court observed in *Morales*, "[s]ome state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner to have pre-emptive effect." 504 U.S. at 390 (citation and quotations

omitted) (brackets in original). The same would be true for the posting of the weight capacity of bridges, underpass clearance, and street width limits, so long as they applied to vehicular traffic generally, not just motor carriers. Local authority to enact such measures does not depend upon the safety exemption.

On the other side of the coin, consumer protection statutes, method of payment requirements, hours of operation mandates, and restrictive licensing schemes would all seem to plainly relate to prices and services. *See Wolens*, 513 U.S. at 226-27 (consumer protection statutes relates to price and service). And while it is an inexplicably confused question in the lower courts as to whether such laws constitute *motor vehicle* safety regulations, in either case no absurdity results. Either such laws *are not* motor vehicle safety regulations – as seems fairly plain – and hence are preempted at both the state and local level regardless of the safety exemption, or they *are* motor vehicle safety regulations and thus can be adopted by the States themselves. Given that localities lack any particular advantage in adopting such laws piecemeal, uniform state laws in this category create no absurd results.

Finally, as to matters that plainly involve motor vehicle safety, such as emergency lights, adequate cables and chains, vehicle maintenance, and the like, such requirements are perfectly suited for adoption at the state level in the same manner as all other general vehicle safety and inspection requirements are imposed by the States. Local preemption of such matters thus poses no danger to vehicle safety and helps reduce a potential morass of conflicting and duplicate requirements, facilitating a fluid and unburdened market as was Congress' intent.

CONCLUSION

For the foregoing reasons, the decision of United States Court of Appeals for the Sixth Circuit should be affirmed.

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